PATTON BOGGS LLP
ATTORNEYS AT LAW

2550 M Street, NW
Washington, DC 20037
202-457-6000

202-457-6315
www.pattonboggs.com

June 29, 2007

William J. McGinley
202-457-6561
wmcginley@pattonboggs.com

VIA FACSIMILE (202) 219-3923
& COURIER
Jeff S. Jordan, Esquire
Supervisory Attorney
Complaints Examination & Legal
Administration
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: MUR 5910
Americans for Job Security
Supplemental Complaint Response

Dear Mr. Jordan.

Please find attached the supplemental response of our client, Americans for Job Security, to the Complaint filed against it in the above-captioned matter. On June 25, 2007, the United States Supreme Court issued its opinion in FEC v. Wisconsin Right to Life, Inc., 551 U.S. __ (2007) upholding the group's as-applied constitutional challenge to BCRA's electioneering communication provision. The Court's holding in the case, and its explanation of the basis for its holding, provides additional authority for the factual and legal arguments made in AJS's initial response to the Complaint.

Please do not hesitate to contact us with any questions

Respectfully submitted,

William J McGinley

Attachments

cc The Honorable Robert D Lenhard, Chairman
The Honorable David M. Mason, Vice Chairman
The Honorable Hans A. von Spakovsky
The Honorable Steven T Walther
The Honorable Ellen L. Weintraub

BEFORE THE FEDERAL ELECTION COMMISSION

In The Matter Of)
) MUR 5910
Americans for Job Security)

SUPPLEMENTAL RESPONSE OF AMERICANS FOR JOB SECURITY TO THE COMPLAINT FILED BY PUBLIC CITIZEN, INC.

This supplements the May 25, 2007 response[1] ("AJS Brief I") of our client, Americans for Job Security ("AJS" or "Respondent"), to the notification by the Federal Election Commission ("Commission") of a complaint filed against it by Public Citizen in the above referenced matter[2] On June 25, 2007, the United States Supreme Court issued its opinion in FEC v. Wisconsin Right to Life, Inc., 551 US __ (2007) (hereinafter "WRTL" or "Slip op.") upholding the group's as-applied constitutional challenge to BCRA's electioneering communication provision. The Court's holding in the case, and its explanation of the basis for its holding, provides additional authority for the factual and legal arguments made in AJS's initial response to the Complaint. For the reasons set forth below and in the original response, the complaint is without merit and the Commission should find no reason to believe, close the file, and take no further action [3]

---

[1] AJS's May 25, 2007 response to the complaint contains an analysis of each communication referenced in the Complaint under 11 C.F.R. 100.22(a) and (b) and is incorporated by reference. The analysis of each communication demonstrates that none of them constitute express advocacy under either definition. Moreover, for the reasons set forth in AJS Brief I and as explained below, none of the communications constitute the functional equivalent of express advocacy under the Supreme Court's test in FEC v. Wisconsin Right to Life, Inc.

[2] Public Citizen's complaint is actually comprised of two components. The first is the four page cover letter that constitutes the Commission complaint against AJS that will hereinafter be referred to as "PC FEC." The second component is a complaint Public Citizen allegedly filed with the IRS that contains the factual allegations that will hereinafter be referred to as "PC IRS."

[3] As stated in AJS's May 25, 2007 response to the Complaint in this matter, the Respondent's brief, exhibits and attachments filed in response to the Casey campaign complaint in MUR 5694 is hereby incorporated by reference.

I. INTRODUCTION

Initially, the Court's holding that the broad application of the electioneering communication provision to communications aired shortly before an election must be narrowed to reach only those communications that advocate the election or defeat of a specific candidate must be followed by the Office of General Counsel and the Commission in political committee status matters. See Faucher v. FEC, 928 F.2d 468, 471 (1st Cir. 1991) ("... an interpretation given a statute by the Supreme Court becomes law and must be given effect. It is not the role of the FEC to second-guess the wisdom of the Supreme Court.") (citations omitted). Furthermore, for those communications not subject to the electioneering communication provision under BCRA § 203, the Court reaffirmed that the "magic words" express advocacy test established in Buckley v. Valeo remains the test for determining whether a communication constitutes an expenditure under the Act and Commission regulations. See Slip op. at 13-14 ("It therefore rejected such an approach, and McConnell did not purport to overrule Buckley on this point – or even address what Buckley had to say on the subject."), see also AJS Brief I at 10. The Commission can no longer – nor could it ever – use contextual factors to create an electoral meaning that is not supported by the plain language of the communication – a Commission practice that was argued before the Court and which was specifically rejected. See Slip op. at 16-20; see also AJS Brief I at 14. Therefore, only communications that in express terms advocate the election or defeat of a clearly identified federal candidate can constitute an expenditure under the Act. See Buckley v. Valeo, 424 U.S. 1, 42 n.52 (1976).

The Court also flatly rejected the type of subjective study developed by Public Citizen as the factual predicate for filing its Complaint. See Slip op. at 12-13. Specifically, the WRTL Court criticized the studies that served as the evidentiary record in McConnell. "Those studies asked 'student coders' to separate ads based on whether the students thought the 'purpose' of the ad was

'to provide information about or urge action on a bill or issue' or 'to generate support or opposition for a particular candidate'" Id. at 12 Public Citizen's study analyzed AJS's communications in the same manner using the "context" of an IRS Revenue Ruling that utilizes contextual and subjective factors to determine whether an activity constitutes political activity for tax purposes See PC IRS at 3, 6-8 By Public Citizens' own admission, its study employs the "IRS standard for electioneering speech [which] is broader than the standard historically used by the FEC" because it is designed to determine which communications are "intended" have a political impact See id. at 3 In fact, the contextual factors utilized by Public Citizen in its study include the same factors that were considered and specifically rejected by the Court in WRTL as irrelevant, such as the timing of the communication and the organization's other activities See PC IRS at 6; Slip op at 16-20 Therefore, Public Citizens' study is not a sufficient factual basis for a reason to believe finding in this matter and the Commission must dismiss the Complaint

As stated in AJS Brief I, each AJS communication listed in the Complaint contains a clear non-electoral call to action that urges the recipient or viewer to contact the referenced public leader to communicate his or her views on the issues discussed in the advertisement. No AJS advertisement identifies a public leader as a candidate, refers to an election, urges anyone to take any electoral action, or asks anyone to contribute to a campaign. Therefore, the AJS communications do not constitute express advocacy even under the expanded, and previously held unconstitutional, definition of express advocacy under 11 C.F.R. § 100 22(b) Accordingly, the OGC must recommend, and the Commission must find, that that there is no reason to believe that a violation of the Act was committed in this matter, dismiss the Complaint, and take no further action

Finally, WRTL precludes the Commission from engaging in open-ended discovery in the present MUR that would have the effect of depleting the Respondent's resources and chilling its First Amendment rights and activities See Slip op at 15 n 5, 20. The Court specifically singled out

the discovery practices employed by the Commission and intervenors for criticism as a "severe burden on political speech." Id. at 15 n. 5. Any discovery by the Commission must be tailored to determine whether a communication in express terms constitutes an appeal to vote for or against a specific federal candidate – a determination that can be made solely from a plain, objective review of the communications themselves. Id. at 16. Any Commission request for documents or depositions that concern contextual factors or background information must be evaluated under WRTL. See id. at 20 ("... the need to consider such background should not become an excuse for discovery or a broader inquiry of the sort we have just noted raises serious First Amendment concerns.") In fact, the Court's reasoning in WRTL calls into question the Commission's decision to pursue political committee status matters on a case-by-case basis through extensive and costly discovery. See id. at 25 ("Enough is enough.")

II. IN WRTL, THE SUPREME COURT HELD THAT A GROUP'S COMMUNICATION IS SUBJECT TO REGULATION UNDER BCRA'S ELECTIONEERING COMMUNICATION PROVISION ONLY IF IT IS SUSCEPTIBLE OF NO REASONABLE INTERPRETATION OTHER THAN AS AN APPEAL TO VOTE FOR OR AGAINST A SPECIFIC CANDIDATE.

As stated in AJS's May 25, 2007 response ("AJS Brief I"), AJS does not satisfy the expenditure path to political committee status because none of the communications constitute express advocacy under 11 CFR § 100.22(a) or (b). It is beyond question that none of the AJS communications exhort the public to campaign for or contribute to any federal candidate. Nor do they explicitly refer to any individual as a candidate or reference an election. As explained in AJS Brief I, each communication discusses public policy issues, the public official or public figure's position on the issue, and asks the public to contact the person and communicate their views.

BCRA and the Court's holding in McConnell did not eliminate the "express advocacy" requirement for expenditures on communications made independently of candidates. In fact, as the Court reasoned in WRTL, "McConnell did not purport to overrule Buckley on this point – or even

address what Buckley had to say on the subject." Slip op at 14; see also AJS Brief I at 10 As explained fully below, a communication cannot constitute even the functional equivalent of express advocacy – let alone express advocacy itself – unless the communication "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." Slip op at 16 Since each AJS communication discusses governmental issues and asks the listeners, viewers or recipients to contact the referenced government official or public figure and express their views – an unmistakable, unambiguous non-electoral call to action – none of the AJS communications constitute express advocacy or its functional equivalent

A. The Court Articulated The Functional Equivalent Test For Broadcast Communications That Air Within Sixty Days Of A General Election and Thirty Days Of A Primary Election To Determine Whether They Are Subject To Regulation Under BCRA.

In WRTL, the group challenged BCRA's electioneering communication provision on First Amendment grounds The electioneering communication provision bans the use of corporate or union funds to finance broadcast, radio or television advertisements that reference a federal candidate within sixty days of the general election or thirty days of the primary election. It also imposes specific reporting requirements on individuals or groups that use non-corporate or union funds to finance such communications It is important to note that the trigger for the application of the electioneering communication provision is a reference standard and not an electoral advocacy standard. This standard is much broader than the express advocacy standard under Buckley and its progeny and, per WRTL, much broader than the "functional equivalent" class of communications that may constitutionally be regulated under the Act The broad sweep of the challenged electioneering communication provision makes the Court's holding in WRTL more salient to any express advocacy inquiry.

The Court rejected the Commission's argument that the advertisements at issue were the functional equivalent of express advocacy because the Court found that the communications may be

reasonably interpreted as something other than an appeal to vote for or against a particular candidate. In doing so, the Court articulated the test for determining whether an advertisement constitutes the functional equivalent of express advocacy and therefore is subject to regulation under the electioneering communication provision

> In light of these considerations, a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. Under this test, WRTL's ads are plainly not the functional equivalent of express advocacy First, their content is consistent with that of a genuine issue: The ads focus on a legislative issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter. Second, their contest lacks indicia of express advocacy: The ads do not mention an election, candidacy, political party or a challenger; and they do not take a position on a candidate's, character, qualifications, or fitness for office

Slip op at 16 (emphasis added) The clear import of the Court's test is that the plain meaning of the communication's words and images must be an appeal for the recipient, viewer or listen to "vote for or against a specific candidate " The Court reaffirmed that the intent and effect of a communication are barred as legitimate considerations in a political committee status matter.[4] Id, at 13-14, see also AJS Brief I at 14 n 9. Any other action urged or appeal contained in the communication such as one asking the viewer or listener to call the public figure identified in the communication cannot

---

[4] The Court's holding in WRTL also calls into question the Commission's solicitation/contribution regulation, 11 C.F.R. § 100 57, for post January 1, 2005 requests for financial support and its untenable interpretation of FEC v. Survival Education Fund, Inc., 65 F 3d 285 (2nd Cir 1995), for requests for funds occurring prior to January 1, 2005, to determine whether a group has satisfied the contribution path under the Commission's political committee status analysis

> Under the test set forth above, that is not enough to establish that the ads can only be reasonably viewed as advocating or opposing a candidate in a federal election "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable members of society to cope with exigencies of their period " Discussion of issues cannot be suppressed simply because the issues may also be pertinent in an election Where the First Amendment is implicated, the tie goes to the speaker, not the censor

Slip at 21 (citations omitted) This reasoning is consistent with the Survival Education Fund Court which stated that "issue advocacy groups may take positions favorable and unfavorable to different candidates, and may solicit contributions to promulgate their views to the public, even if for the express purposes of applauding or criticizing candidates during an election campaign " 65 F 3d at 295 Therefore, an organization does not satisfy the contribution path to political committee status if it requests funds to finance communications that are exempt from regulation under WRTL's functional equivalent test and Buckley's magic words express advocacy test

support a finding of express advocacy or its functional equivalent Id. at 21 n.7 ("[W]e agree with Justice Scalia on the imperative for clarity in this area; that is why our test affords protection unless an ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.") (emphasis in original and added), see also AJS Brief I at 14-15.

B. The Commission Is Precluded From Engaging In Burden Shifting By Inferring An Electoral Advocacy Message In A Communication That Is Not Supported By The Plain Meaning Of The Words Actually Contained In The Communication

The Court also held that the FEC and federal courts cannot engage in burden shifting by placing the Respondent in the position of proving that an advertisement does not constitute express advocacy or its functional equivalent Any analysis of a communication must begin from the standpoint that the communication contains protected political speech and is not subject to regulation. Slip op at 29. The Commission bears the burden of proving that there is no other reasonable interpretation of the communication other than express advocacy. Id. at 21 ("Discussion of issues cannot be suppressed simply because the issues may also be pertinent to an election") In fact, any doubt concerning the meaning of a phrase or word must be resolved in favor of a finding of no express advocacy or its functional equivalent. Id. ("Where the First Amendment is implicated, the tie goes to the speaker, not the censor."); id. at 16 ("In short, it must give the benefit of any doubt to protecting rather than stifling speech."); see also AJS Brief I at 14

In addition, the Court reasoned that the FEC and courts cannot misconstrue a non-electoral call to action in a communication as evidence of some type of "subtle" or effective express advocacy or its functional equivalent Slip op at 16-18; see also AJS Brief at 14 In fact, the Court emphatically closed the door on this type of flawed analysis.

> Rephrased a bit, the argument perversely maintains that the less an issue ad resembles express advocacy, the more likely it is to be the functional equivalent of express advocacy This "heads I win, tails you lose" approach cannot be correct.

Id. at 18 (emphasis in original) Each communication must be evaluated based upon a plain review of script and video The FEC and the courts do not have the authority to create or infer an election meaning or message where there is none, or to impute an election meaning into words that contradicts the plain meaning of those words If a communication contains a clear non-electoral call to action, the plain meaning of those words control the analysis of the communication. Id. at 17 ("An issue ad's impact on an election, if it exists at all, will come only after the voters hear the information and choose – uninvited by the ad – to factor into their voting decisions."); see also AJS Brief at 14

As stated in AJS Brief I, each AJS communication listed in the Complaint contains a clear non-electoral call to action that urges the recipient or viewer to contact the referenced public leader to communicate his or her views on the issues discussed in the advertisement No AJS advertisement identifies a public leader as a candidate, refers to an election, urges anyone to take any electoral action, or asks anyone to contribute to a campaign. Therefore, the AJS communications do not constitute express advocacy or its functional equivalent under WRTL and even under the expanded, and previously held unconstitutional, definition of express advocacy under 11 C.F.R. § 100 22(b).

C. The Court in WRTL specifically bars the FEC and Federal Courts from considering contextual factors in an express advocacy inquiry

In WRTL, the FEC argued that several contextual factors prove that the ads in question were the functional equivalent of express advocacy Slip op. at 18. The purpose of examining the contextual factors was to create evidence of WRTL's subjective intent concerning the purpose of the advertisements at issue Specifically, the FEC argued that WRTL's other activities, the timing of the communications, and the reference to a website that contained express advocacy were relevant factors to determining whether WRTL's communications constituted express advocacy or its functional equivalent Listed below are the three factors and the Court's determination that each

factor is irrelevant to an inquiry concerning whether a communication constitutes the functional equivalent of express advocacy.

> * An organization's other activities: The Court reasoned that WRTL does not forfeit the right to speak on issues simply because WRTL's political action committee actively opposed one of the individuals referenced in the communication. This evidence goes to subjective intent and is irrelevant in an express advocacy inquiry. Slip op. at 18.
>
> * Timing: The Commission argued that since the communications were to be aired in close proximity to an election, not aired near actual Senate votes, and that WRTL did not run the communications after the election were evidence of an electoral intent. "To the extent this evidence goes to WRTL's subjective intent, it is again irrelevant." Slip op. at 19. The Court further reasoned that "a group can certainly choose to run an issue ad to coincide with public interest rather than a floor vote" and "WRTL's decision not to continue running its ads after the blackout period does not support an inference that the ads were the functional equivalent of electioneering." Id. Therefore, timing may not be considered when determining whether a communication constitutes express advocacy or its functional equivalent.
>
> * Reference to websites: The Commission also argued that the communications' specific and repeated reference to a website that allowed visitors to sign up for email alerts were further evidence that the communications constituted the functional equivalent of express advocacy. Some of the email alerts contained express advocacy concerning one of the individuals referenced in the communication. The Court reasoned that the use of express advocacy in other aspects of the organization's activities is "not a justification for censoring issue-related speech." Slip op. at 20. "Any express advocacy on the website, already one step removed from the text of the ads themselves, certainly does not render an interpretation of the ads as genuine issue ads unreasonable." Id.
>
> Each of the inquiries listed above – and any inquiries that go beyond the four-corners, plain meaning of the communication – only lead to evidence of intent and effect. Evidence that the Court held is irrelevant to an express advocacy or its functional equivalent inquiry.
>
> > Far from serving the values the First Amendment is meant to protect, an intent-based test would chill core political speech by opening the door to a trial on every ad within the terms of § 203, on the theory that the speaker actually intended to affect an election, no matter how compelling the indications that the ad concerned a pending legislative or policy issue. It would also lead to burdensome, expert-driven inquiry, with an indeterminate result. Litigation on such a standard may or may not actually predict electoral effects, but it will unquestionably chill a substantial amount of political speech.

Slip op. at 14-15, see also id. at 15 n.5 ("Such litigation constitutes a severe burden on political speech."). Indeed, the only relevant factor in an inquiry concerning express advocacy or its

functional equivalent is an objective review of the communication at issue. See id. at 21 n.7 ("[T]here generally should be no discovery or inquiry into the sort of 'contextual' factors highlighted by the FEC and intervenors ").

III. CONCLUSION

The Court in WRTL specifically held that a communication must contain an appeal to vote for or against a candidate for it to constitute express advocacy or its functional equivalent. Any other reasonable interpretation of a communication places it outside constitutional regulation, outside the Commission's jurisdiction, and it cannot be used as a basis for finding that an organization qualifies as a political committee under the Act and Commission regulations. The Commission must follow the Court's command in WRTL:

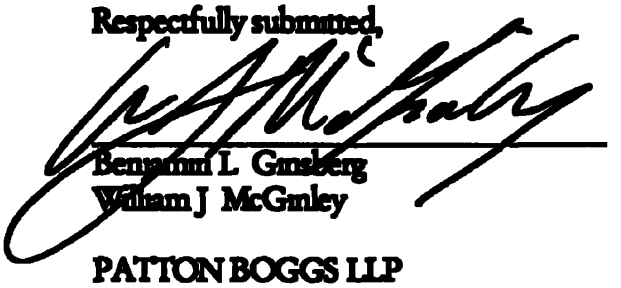
> As should be evident, we agree with Justice Scalia on the imperative for clarity in this area, that is why our test affords protection unless an ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. It is why we emphasize that (1) there can be no free-ranging interest-and-effect test, (2) there generally should be no discovery or inquiry into the sort of "contextual" factors highlighted by the FEC and intervenors; (3) discussion of issues cannot be banned merely because the issues might be relevant to an election, and (4) in a debatable case, the tie is resolved in favor of protecting speech.

Slip op. at 21 n. 7. The Court's clear command in this case is that only communications that in express terms advocate the election or defeat of a specific candidate can constitute express advocacy or its functional equivalent. Any other reasonable reading of a communication based upon its plain language must compel a finding of no express advocacy.

As fully explained in AJS Brief I, AJS's communications do not constitute express advocacy under 11 C.F.R. § 100.22(a) or (b). It is beyond question that none of the AJS communications exhort the public to campaign for or contribute to any federal candidate. See 72 Fed. Reg. 5604 ("Express advocacy also includes exhortations 'to campaign for, or contribute to, a clearly identified candidate'") Nor do they refer to any individual as a candidate or reference an election. MUR 5634 OGC Report # 2 at 16. Each AJS communication listed in the Complaint discusses public

policy issues, the public official or community leader's position on the issue, and asks the public to contact the person and communicate their views. Therefore, there is no factual or legal basis for finding that reason to believe exists that AJS qualifies as a political committee under the Act and Commission regulations. The OGC must recommend, and Commission must find, that there is no reason to believe, dismiss the Complaint, and close the file on this matter

Respectfully submitted,



Benjamin L. Ginsberg
William J. McGinley

PATTON BOGGS LLP
2550 M Street, NW
Washington, DC 20037
P (202) 457-6000
F: (202) 457-6315

29044232125